(28,341)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 336.

REGAL DRUG CORPORATION, PETITIONER,

vs.

JUSTUS S. WARDELL, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE OF THE FIRST DISTRICT OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the Southern Division of the United States District Court for the Northern District of California, Second Division.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Bill of Complaint.

Now comes the plaintiff above named and files its bill of complaint against defendant above named, and alleges:

I.

That the Regal Drug Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco.

II.

That the defendant is the duly appointed, qualified and acting United States Collector of Internal Revenue of the First District of California, and a citizen and resident of the State of California and the Northern District thereof.

III.

That on and prior to the 17th day of September, [1*] 1919, plaintiff was the holder of a permit, authorizing it to sell in-
2 toxicating liquor for medicinal purposes and that said permit was issued to it by defendant in accordance with the provisions of the "National Prohibition Act."

IV.

That during the month of April, 1920, the defendant revoked plaintiff's said permit and attempted to levy and assess against said plaintiff and its property, six penalties, amounting in the aggregate to the sum of $77,411.36 and thereupon said defendant demanded payment of said sum from said plaintiff.

V.

That plaintiff has no information as to the method, reason or basis of said revocation, or of said attempted levy and assessment

*Page number appearing at foot of page of original certified Transcript of Record.

and has applied to defendant for information regarding the method, reason or basis of said revocation and of said attempted levy and assessment, but has been unable to procure any information from defendant concerning the same.

VI.

That the action of the said defendant is entirely illegal, unauthorized and void and beyond his jurisdiction and power for the reason that plaintiff has never, at any time violated any law or laws relating to the sale of intoxicating liquors, but, to the contrary, it has at all times complied with the laws governing the sale of intoxicating liquors and has at all times conformed, in good faith, to the provisions of the "National Prohibition Act."

VII.

That plaintiff upon making application for the [2] permit herein mentioned, caused to be filed, in accordance with law,
3 a bond in the sum of $100,000 conditioned upon its compliance with all the requirements of the laws of the United States, respecting the sale or use of distilled spirits and wines for other than beverage purposes, and that said bond is still in full force and effect and liable for the amount of said penalties attempted to be levied as aforesaid.

VIII.

That plaintiff maintains a large drug store in the City and County of San Francisco, at No. 1110 Market Street, and is engaged in the business of selling drugs at said location and maintains on said premises a large stock of drugs, medicines and sundries, other than intoxicating liquors.

IX.

That defendant has seized, distrained and taken possession of the premises of plaintiff at said No. 1110 Market Street and all of the stock and fixtures therein and has dispossessed said plaintiff and threatens to and will continue in possession thereof and threatens to and will sell and dispose of the whole of said stock and fixtures contained in said premises for the payment of said penalty.

X.

That plaintiff will suffer great and irreparable damage and injury if the said defendant continues so in the possession of, distrains, sells or otherwise disposes of said stock and fixtures, and in this behalf [3] the said plaintiff alleges:

(a) That defendant has taken possession of said premises and the stock and fixtures therein contained, and has made it im-
4 possible for plaintiff to conduct its business as a druggist and that if defendant continues to interfere with plaintiff's busi-

ness, it will be ruined, and plaintiff will be thereby damaged in the sum of $100,000.

(*b*) That the said defendant is not financially able to respond in damages in any substantial amount for any of the acts done by him, or threatened to be done by him, and if the said defendant should sell said property of plaintiff, it would suffer damages in excess of $100,000, while defendant, as plaintiff is informed and believes, is financially unable to respond in damages in any amount exceeding $10,000.

XI.

That this Court is vested with jurisdiction of the matters and things herein alleged by virtue of Section 5 and Section 9 of Title II of the National Prohibition Act.

XII.

That the matter in dispute herein exceeds the sum of $3,000.00, exclusive of interest and costs.

Wherefore, plaintiff prays:

1st. That it may please your Honors to issue a writ of subpœna out of this court, directed to Justus S. Wardell, United States Collector of Internal Revenue, requiring him to appear and answer in the premises.

2d. That it may please your Honors to grant unto plaintiff a Writ of Injunction, pendente lite, enjoining [4] and restraining said defendant from taking or continuing the possession of and seizing, distraining or otherwise interfering with any of the property of plaintiff described herein, or from taking any action or proceeding to force the collection of said penalties pending the determination of this cause.

3d. That it may please your Honors, pending the issuance of the injunction pendente lite, to issue a restraining order restraining said defendant until the further order of the Court from doing any of the things aforesaid.

4th. That on the final hearing the injunction may be made perpetual.

5th. That the permit of plaintiff heretofore revoked by defendant may be restored.

6th. And for such other and further relief as may be meet in the premises, and that plaintiff may recover its costs of suit herein expended.

JNO. W. PRESTON,
ROBERT DUNCAN,
Solicitors for Plaintiff. [5]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Noble, being first duly sworn, deposes and says: That he is an officer, to wit, the President of the Regal Drug Corporation, a corporation, plaintiff herein, and makes this affidavit on behalf of said corporation; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief. C. S. NOBLE.

Subscribed and sworn to before me this 20th day of July, 1920.
[SEAL.] C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California.

6 [Endorsed:] Filed July 20, 1920. Walter B. Maling, Clerk. [6]

(Title of Court and Cause.)

Affidavit of Edward Thomas O'Day and W. G. Walker in Opposition to Application for Restraining Order.

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, ss:

Edward Thomas O'Day, first duly sworn, deposes and says: That he is and at all times hereinafter mentioned was a duly authorized and acting Deputy Collector of Internal Revenue, for the First District of California, and that he is the duly authorized representative of Justus S. Wardell, Collector of Internal Revenue for said District, and the defendant herein, as such Deputy Collector, and while acting with the authority for said Collector, he did on the 21st day of June, 1920, receive in San Francisco from the office of the Commissioner of Internal Revenue at Washington, District of Columbia, a United States Internal Revenue Assessment List for the said District, classification spirits, said list being for April, 1920, and on *from* 23B, which did in all matters conform to law and the regulations of the Treasury Department, Bureau of Internal Revenue, of the United States, which said assessment contained the following item:

7

Name and address of taxpayer.	Description item.	
Regal Drug Corp. (Dr. Chas. S. Noble, Pres.), 1110 Market St., San Francisco, 026709.	W. L. D. & R. L. D. 6 mos. 20.	Sec. 35.
	Rect. Less Sec. 3244, 9 mos. 20.	
	Rect. Less Sec. 35, 6 mos. 20.	
	Dif. tax spts. & wines.	

	Total tax.
D. T.	100.00
D. T.	25.00
S. P.	500.00
T.	75.00
P.	18.00
D. T.	100.00
S. P.	1000.00
T.	75592.61

That pursuant to receipt of said assessment list, and according to the law and regulations of said department and Bureau [7] of internal Revenue, affiant on the 23d day of June, 1920, caused notice of demand to be addressed to the Regal Drug Corporation (Dr. Chas. S. Noble, Pres.), 1110 Market Street, San Francisco, and that the same was inclosed in an envelope of the Internal Revenue Department addressed as above set forth, and that he caused the same to be deposited in the United States Post Office at San Francisco; that in like manner on July 1, 1920, he caused to be addressed, inclosed and mailed a second notice and demand in accordance with law and regulations of the Treasury Department, Bureau of Internal Revenue on form number as provided by the regulations of said bureau; that subsequent and on the 19th day of July, 1920, defendant herein as Collector of Internal Revenue for the First District of California, duly and regularly issued four United States Internal Revenue warrants for distraint on Treasury Department, Bureau of Internal Revenue form 69, addressed to W. G. Walker, a duly authorized and acting Collector of Internal Revenue and numbered 2157, 2158, 2159 and 2160, which warrants were in due and regular form, and according to law and the regulations of the Treasury Department, Bureau of Internal Revenue and were for distraint for the collection of items of tax set forth in the United States Internal Revenue assessment list aforesaid.

EDWARD THOMAS O'DAY.

Subscribed and sworn to before me this 20th day of July, 1920.

[SEAL.] J. A. SCHAERTZER,
Deputy Clerk U. S. District Court,
Northern District of California. [8]

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco:

W. G. Walker, being first duly sworn, deposes and says: That he was and at all times hereinafter mentioned was duly authorized and acting Deputy Collector of Internal Revenue in and for the first District of California, wherein Justus S. Wardell, the defendant herein, is a Collector and in charge of Field Forces, whose duty it is to serve warrants of distraint, issued from said Collector of Internal

Revenue; that on the 19th day of July, 1920, pursuant to his
9 duties as such Deputy Collector and in a manner in accordance with law and the rules and regulations of the Treasury Department, Bureau of Internal Revenue, did under authority of said warrant levy upon all property and rights to property situated at 1110 Market Street, and belonging to the Regal Drug Corporation (Chas. S. Noble, Pres.).

That said levy was made for the purpose of collecting the moneys due under an assessment issuing from the office of the Commissioner of Internal Revenue Treasury Department, at Washington, D. C.

W. G. WALKER.

Subscribed and sworn to before me this 20 day of July, 1920.

[SEAL.] J. A. SCHAERTZER,
Deputy Clerk U. S. District Court,
Northern District of California.

[Endorsed:] Filed July 20, 1920. Walter B. Maling, Clerk. [9]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

10 *Amended Bill of Complaint.*

Now comes the plaintiff above named and files its amended bill of complaint herein, by leave of the Court first had, and alleges against the above-named defendant as follows:

I.

That the Regal Drug Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has its principal place of business in the City and County of San Francisco, State of California.

II.

That the defendant is and at all the times herein mentioned has been the duly appointed, qualified and acting United States Collector of Internal Revenue of the First District of the State of California, and is a citizen and resident of the said State of California, and of the Northern District thereof. [10]

III.

That on the 28th day of October, A. D. 1919, plaintiff was the holder of a permit authorizing said plaintiff to sell intoxicating liquor and distilled spirits for nonbeverage purposes, and that said permit was issued to said plaintiff by the proper officers of the United States Government, in accordance with the provisions of the National Prohibition Act. That said plaintiff continued to be the holder of said permit until some time in the month of June, A. D. 1920, and during said period of time said permit was in full force and effect.

11

IV.

That during said period of time the said plaintiff purchased and withdrew from the bonded warehouses under the supervision of the officials of the United States Government, distilled spirits and intoxicating liquors to the amount of about seventeen thousand nine hundred (17,900) gallons, and also during said period of time purchased and withdrew from said bonded warehouses sweet wines containing not over twenty-one per cent of alcohol, amounting to about four hundred and fifty (450) gallons, and that during said period of time said plaintiff purchased dry wines containing not over fourteen (14) per cent of alcohol, amounting to about twenty (20) gallons. That all taxes and assessments against said distilled spirits, intoxicating liquors, sweet wines and dry wines, which were levied and could be levied thereon by the United States Government in every form, were fully paid by said plaintiff in advance. That during said period of time and when said permit was in full force and effect, said plaintiff disposed of all of said distilled spirits, intoxicating [11] liquors, sweet wines and dry wines, and the same were sold and disposed of by said plaintiff under said permit, and under and in accordance with the provisions of the National Prohibition Act.

V.

That said plaintiff upon receiving said permit, caused to be filed with the proper United States authorities in accordance with law, a bond in the sum of One Hundred Thousand Dollars ($100,000.00) in the form required by said law, respecting the sale or use
12 of distilled spirits and wines for other than beverage purposes, and that said bond is still in full force and effect, and the surety on said bond is fully able to respond to the full amount thereof.

VI.

That said plaintiff during all of said time has had and still has a large drugstore in said City and County of San Francisco, at No. 1110 Market Street, and has been engaged in the business of selling drugs at said location and maintains on said premises a large stock

of drugs, medicines, and sundries, other than intoxicating liquors. That said stock is worth about the sum of fifteen thousand dollars ($15,000.00).

VII.

That plaintiff is informed and believes, and its officers are informed and believe, and upon such information and belief allege the following facts: That in or about the month of June, A. D. 1920, the Commissioner of Internal Revenue of the United States of America, arbitrarily levied against said plaintiff a so-called assessment or tax at the rate of $6.40 per gallon, amounting in the aggregate to one [12] hundred fifteen thousand ninety-two and 50/100 dollars ($115,092.50), upon all distilled liquors which had been withdrawn by said plaintiff from said bonded warehouses between the 28th day of October, A. D. 1919, and the time when the permit of said plaintiff to sell and dispose of said distilled spirits was revoked, to wit, in the month of June, A. D. 1920. That said Commissioner also arbitrarily levied a so-called tax or assess-
13 ment against said plaintiff at the rate of forty cents (40¢) per gallon on all sweet wines purchased and disposed of by said plaintiff during said period of time, amounting in the aggregate to one hundred fifty-three dollars eighty cents ($153.80). That said Commissioner also levied against said plaintiff a so-called tax or assessment on all dry wines purchased and disposed of by said plaintiff, which tax or assessment was at the rate of sixteen (16¢) cents per gallon, amounting to the total sum of $3.20. That none of said levies were either taxes or assessments, but are in fact fines and penalties attempted to be imposed on plaintiff without a hearing. That said plaintiff had already paid taxes on all of said articles amounting to the sum of thirty-nine thousand six hundred fifty-six and eighty-nine-one-hundredths ($39,656.89) dollars. That said Commissioner of Internal Revenue claimed and claims that there is due from said plaintiff the further sum of seventy-five thousand five hundred ninety-two and 61/100 ($75,592.61) dollars, as a so-called tax or assessment on said distilled spirits, intoxicating liquors, and wines over and about the amount already paid by said plaintiff as aforesaid. That upon, and according to its information and belief, and the information and belief of its officers as aforesaid, said plaintiff alleges that said Commissioner of Internal Revenue also levied against said plaintiff a penalty in the sum of five hundred ($500.00) dollars, for retailing [13] and selling distilled spirits, intoxicating liquor and wines in violation of the law, and also levied against said plaintiff a penalty in the sum of ninety-three and 75/100
14 dollars ($93.75) for having conducted the business of a rectifier in violation of the law, and also levied against said plaintiff a penalty in the sum of one thousand dollars ($1,000.00) for having manufactured distilled spirits or intoxicating liquors in violation of law.

VIII.

Plaintiff alleges as aforesaid that all taxes and assessments which could be properly levied upon all of the said distilled spirits, intoxicating liquors and wines, had been and were fully paid at the time the same were purchased and withdrawn by plaintiff from said bonded warehouses, and that prior to the attempted levy of said so-called taxes and assessments hereinabove mentioned, and of said penalties, all of the said distilled spirits, intoxicating liquors and wines had been sold and disposed of by said plaintiff. That in making the so-called levy of said taxes and assessments against this plaintiff, said Commissioner of Internal Revenue did not, nor did his assistants, deputies or agents, hold or conduct any hearing in regard to the matter, or give any notice thereof to said plaintiff, nor to its officers or agents in regard thereto, nor that the same was proposed to be levied or assessed against said plaintiff. That said plaintiff had not, nor had any of its officers, any knowledge or information that said Commissioner of Internal Revenue, his deputies or assistants or agents, intended to make any levy of any of said so-called assessments, levies or penalties against this plaintiff, and said plaintiff has not, nor has [14] any of its officers, any knowledge of the basis or grounds upon which any of said actions were taken. Said plaintiff alleges that no evidence was taken, had or received by said Commissioner of Internal Revenue in regard thereto prior to said attempted levy, or the imposition of any of said penalties against this plaintiff. That said plaintiff was never given any opportunity to be heard in said matter or to present any evidence in regard thereto.

IX.

That on the 19th day of July, A. D. 1920, the defendant herein took possession of the drug store of said plaintiff, situated at No. 1110 Market Street, in said City and County of San Francisco, and of the entire stock of drugs and goods therein, and is proceeding to and threatening to sell the same in order to satisfy the claim for said so-called taxes, or assessments and said penalties. That said defendant has closed the drug store as against plaintiff, and has excluded plaintiff, its officers and agents therefrom, and refuses to allow the said plaintiff to carry on or conduct its said business in selling drugs and other merchandise carried in said store. That said plaintiff has established a good business and trade at its said store and unless said defendant is restrained from selling its said stock of goods and is restrained and enjoined from remaining in possession of said store, the business of said plaintiff will be entirely ruined, and the good will of said business entirely destroyed. That the damage done to plaintiff thereby will be irreparable. [15]

X.

That the said permit issued to plaintiff to sell intoxicating
16 liquor and distilled spirits for other than beverage purposes was revoked without taking any evidence thereon.

XI.

That the action of said defendant in seizing said drugstore and the levy of the so-called taxes and assessments and penalties against the plaintiff, are and each of them is, entirely illegal, arbitrary, unauthorized and void, and are and each of them is beyond the jurisdiction of the said defendant, and are beyond the jurisdiction of the said Commissioner of Internal Revenue.

XII.

That said plaintiff has no funds with which to pay the said so-called taxes or assessments or penalties, and it is impossible for said plaintiff to raise said sums of money or any substantial part thereof; that if said defendant proceeds to sell said stock of drugs under the said proceedings, the same would be sacrificed and would bring only a small part of their actual value, and thus said plaintiff would lose said property and a very large part of the value thereof. That said defendant has no jurisdiction or power to sell *to sell* said stock of goods, and no one purchasing the same could be assured of obtaining any title thereto, and in addition thereto the good will of the business of said plaintiff will be utterly destroyed and lost. Plaintiff is informed, and its officers are informed and believe, and upon such information and belief allege that said defendant is not financially able to respond in damages [16] in any substantial amount for any of the acts threatened by him, and if said defendant shall take,
17 seize or sell the said property, complainants would suffer damages in excess of the sum of fifteen thousand dollars, and that defendant is financially unable to respond in damages in any amount exceeding ten thousand dollars.

Wherefore, plaintiff prays that it may please your Honors to issue a writ of subpœna, issued out of this Court, directed to said defendant, requiring him to appear and answer in the premises, and that it may please your Honor to grant a writ or injunction pendente lite, enjoining and restraining said defendant from taking or continuing in possession of said drugstore or said stock of goods, or any other property of said plaintiff, and from seizing or distraining or otherwise interfering with any property of plaintiff, or from conducting any action or proceeding to enforce the collection of said so-called taxes, assessments or penalties, pending the determination of this cause, and that it may please your Honors, pending the issuance of said injunction pendente lite to issue a restraining order restraining said defendant, until the further order of this court, from doing any of the things aforesaid, and that said defendant be required to

deliver up forthwith to said plaintiff the possession of said premises and of said drugstore and said stock of goods. That on final hearing of this case, this injunction be made perpetual. That the permit of plaintiff heretofore revoked may be restored, and plaintiff have such other and further relief as may be meet and proper in the
18 premises, and that plaintiff may recover [17] its costs of suit herein expended.

ROBERT DUNCAN,
J. W. PRESTON,
Solicitors for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Noble, being first duly sworn, deposes and says: That he is an officer, to wit, the President of the Regal Drug Corporation, a corporation, plaintiff herein, and makes this affidavit on behalf of said corporation; that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

C. S. NOBLE.

Subscribed and sworn to before me, this 23d day of July, 1920.
[SEAL.] C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California.

Copy received this 23d day of July, 1920.
FRANK M. SILVA,
U. S. Atty.
E. M. LEONARD,
Asst. U. S. Atty.

[Endorsed:] Filed July 23, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

19 In the Southern Division of the United States District Court for the Northern District of California, First Division.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue, Defendant.

Affidavit of Edward A. Kenny.

Edward A. Kenny, being first duly sworn, deposes and says: That he is and at all times herein mentioned was Chief Inspector in the office of the Federal Prohibition Director for the district of the State of California; that on or about the 15th day of April, 1920, certain violations of the National Prohibition Act at 1110 Market Street,

San Francisco, California, by the above-named Regal Drug Corporation which had a permit theretofore granted under the National Prohibition Act, were made known to said Federal Prohibition Director and to the Federal Prohibition Commissioner by and through the report of H. M. Kupser, a Federal Prohibition Agent, which report shows that said plaintiff violated the conditions of said Act and the conditions of a permit granted thereunder in that said plaintiff sold large quantities of alcoholic liquor containing more than one-half of one percentum of alcohol by volume and filled prescriptions for large quantities of liquor of the aforesaid alcoholic contents without complying with the conditions of said
20 National Prohibition Act, and in violation thereof; that said Commissioner had reason to believe that said plaintiff was not in good faith conforming to the provisions of said Act; that Frank M. Silva, Federal Prohibition Director for the District of California and agent of said Federal Prohibition Commissioner, and under his directions, on the 27th day of April, 1920, issued an order citing said plaintiff to appear before him on the 24th day of May, 1920, to show cause why said permit should not be revoked; that on the said 27th day of April, 1920, said citation accompanied by a statement of the facts constituting the violation of said Act charged was served upon said plaintiff by affiant; that on the 18th day of June, 1920, the matter came on regularly for hearing before said Director and Agent, and after a full and complete hearing, duly and regularly had, at which said plaintiff was represented by its counsel, Frank E. Powers, Esq., said Director and Agent found said plaintiff guilty of wilfully violating the provision of said Act, and revoked said permit; that said [19] revocation was thereafter and on the 8th day of July, 1920, approved by said Federal Prohibition Commissioner; that the said revocation of said permit has not been reviewed by any Court of equity nor has application been made for any such review.

EDWARD A. KENNY.

Subscribed and sworn to before me, this 20th day of July, 1920.

[SEAL.] J. A. SCHAERTZER,
Deputy Clerk U. S. District Court,
Northern District of California.

21 [Endorsed:] Filed Jul. 27, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

(Title of Court and Cause.)

Motion to Dismiss Amended Bill of Complaint.

Now comes the defendant above named and moves to dismiss the amended bill of complaint in the above-entitled motion upon the following grounds:

I.

That said amended bill of complaint does not state a matter of equity entitling plaintiff to any of the relief prayed for in said bill.

II.

That said amended bill of complaint does not state facts sufficient to entitle plaintiff to any of the relief prayed for in said bill, nor does said bill disclose a cause of action equitable in its nature, civil in its character, and arising under the Constitution of the United States.

III.

That this Court has not jurisdiction to hear or determine matters sought to be raised by said bill of complaint nor to grant the relief prayed for therein or any part thereof.

IV.

That it appears from said amended bill of complaint that plaintiff has a plain, speedy, adequate and complete remedy at law.

V.

That said amended bill of complaint is ambiguous in that
22 it presents a suit against the United States collectors of Internal Revenue for the restoration of a permit revoked by the Federal Prohibition Director.

VI.

That said amended bill on its face shows that this is a suit wherein it is attempted to restrain the collection of a tax duly and regularly assessed according to law by the Treasury Department of the United States of America. [21]

Wherefore, defendant prays that said bill of complaint be dismissed and for his costs of suit herein incurred.

FRANK M. SILVA,
United States Attorney;
E. M. LEONARD,
Asst. United States Attorney,
Solicitors for Defendant.

[Endorsed:] Filed Jul. 27, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

At a stated term, to wit, the July term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room, in the City and County of San Francisco, on Saturday, the 31st day of July, in the year of our Lord one thousand nine hundred and twenty.

Present: The Honorable William H. Sawtelle, District Judge for the District of Arizona, designated to hold and holding this court.

23 In Equity.

No. 560.

REGAL DRUG CORPORATION, Plaintiff,

vs.

JUSTUS S. WARDELL, etc., Defendant.

(Order Granting Motion to Dismiss, etc.)

Plaintiff's application for a preliminary injunction and defendant's motion to dismiss the bill, heretofore heard and submitted, being fully considered and the Court having filed its Memorandum; It is ordered that said application for injunction be and the same is hereby denied and said motion to dismiss be and the same is hereby granted. [23]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, etc., Defendant.

24 *Memorandum Opinion.*

John W. Preston, Esq., and Robert Duncan, Esq., Attorneys for Plaintiff.

Frank M. Silva, Esq., United States Attorney and E. M. Leonard, Esq., Assistant United States Attorney, Attorneys for Defendant.

SAWTELLE, *District Judge*:

The general rule is that "a preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted," and I should certainly follow that rule in the case at bar were it not for the inhibition of section 3224 of the Revised Statutes of the United States, which clearly applies in the case at [24] bar and forbids the granting of injunctive relief. I am inclined to the belief that the tax

assessed against the complainant herein is invalid, but even so that fact does not prevent the application of the statute referred to.

The cases of Snyder vs. Marks, 109 U. S. 189, and Dodge vs. Osborn, 240 U. S. 118, appear to me to be controlling as to the case at bar. In the latter case, which was a suit to enjoin the assessment and collection of certain taxes imposed by the Income Tax section of the Tariff Act of October 3d, 1913, the Supreme Court used this language:

25 "The inhibition of Rev. Stat., #3224, applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it * * * Cheatham vs. United States, 92 U. S. 85, 88, and again in State Railroad Tax Cases, 92 U. S. 575, 613, it was said by this Court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by #3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment (assessment) and claim that it is valid."

"And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the
26 assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. Shelton vs. Platt, 139 U. S. 591; Pittsburgh &c. Ry. vs. Board of Public Works, 172 U. S. 32; Pacific Whaling Co. vs. United States, 187 U. S. 447, 451, 452." [25]

Again in the case of the State Railroad Tax Cases, 92 U. S. 575, it is said:

"The Government of the United States has provided, both in the customs and the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general Government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid. That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the as-

assessment or collection of any tax shall be maintained in any court." Rev. Stat., #3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the
27 Government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice."

Respondent's motion to dismiss will be sustained and it is so ordered.

July 31st, 1920.

[Endorsed:] Filed July 31, 1920. Walter B. Maling Clerk. [26]

(Title of Court and Cause.)

Decree.

In the above-entitled cause the defendant having appeared and filed a motion to dismiss, and the said motion having been argued by counsel and submitted to the Court, and the Court having made its order herein granting the said motion and dismissing the said action on the ground that the maintenance of said action is prohibited by Section 3224 of the Revised Statutes of the United States;

Now, therefore, by reason of the premises it is ordered, adjudged and decreed that the bill of complaint herein be dismissed, and that complainants take nothing by said action, and that defendant recover his costs of suit.

28 Dated this 6th day of August, 1920.

WM. H. SAWTELLE,
United States District Judge.

[Endorsed:] Filed and entered August 6th, 1920. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy. [27]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 580.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Petition for Appeal.

To the Honorable the District Court of the United States for the Ninth Circuit, Northern District of California, Southern Division:

The plaintiff, Regal Drug Corporation, a corporation, conceiving itself aggrieved by the final decree pronounced in the above-entitled cause, by which said decree it was ordered that the bill of complaint be dismissed and that the request for a temporary restraining order be denied, and that defendant recover from plaintiff its costs, desires to appeal to the United States Circuit Court of Appeals of the
29 Ninth Circuit, from said decree, and respectfully petitions this Court for an order allowing the said plaintiff to prosecute such appeal in the United States Circuit Court of Appeals of the Ninth Circuit; and that said Court also make an order fixing the amount of the security which said plaintiff shall furnish upon said appeal, and that a certified transcript of the records and proceedings herein be forthwith transmitted, duly authenticated, to the United States Circuit Court of Appeals of the Ninth Circuit.

JOHN W. PRESTON,
ROBERT DUNCAN,
Solicitors for Plaintiff. [28]

Received copy this 7th day of August, 1920.

FRANK M. SILVA,
U. S. Atty.
E. M. LEONARD,
Asst. U. S. Atty.

[Endorsed:] Filed Aug. 7, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

30 *Assignment of Errors.*

Now comes the plaintiff in the above-entitled cause and files the following assignment of errors, upon which it will rely upon its appeal from the final decree herein dismissing said suit.

The Court erred:

I.

In dismissing said suit and in entering a final decree therein in favor of the defendant and against the plaintiff for his costs.

II.

In holding that said Court had no jurisdiction of said cause.

III.

In holding that section 3224 of the Revised Statutes of the United States prohibited the maintenance of a suit for an injunction to enjoin the defendant from seizing the property of plaintiff to satisfy a penalty attempted to be imposed by virtue of the National Prohibition Act, when said penalty was imposed without due process of law and when the imposition of [30] said penalty was beyond the jurisdiction of the officer imposing it.

IV.

In holding that the penalties involved in this suit are "taxes" within the meaning of that word as used in section 3224 of the Revised Statutes of the United States.

V.

In holding that the maintenance of said suit was pro-
31 hibited by section 3224 of the Revised Statutes of the United States.

VI.

In holding that said section 3224 of the Revised Statutes of the United States applies where the defendant is acting outside of and beyond his jurisdiction in claiming the right to seize property when no such right exists, and in claiming to seize property for penalties demanded without right and in violation of law.

VII.

In granting the motion of defendant to dismiss said action for the reason that the Court had no jurisdiction thereof by reason of section 3224 of the Revised Statutes of the United States.

Wherefore, plaintiff prays that the said decree be reversed.

JOHN W. PRESTON,
ROBERT DUNCAN,
Solicitors for Plaintiff.

Received copy this 7th day of August, 1920.

FRANK M. SILVA,
U. S. Atty.
E. M. LEONARD,
Asst. U. S. Atty.

[Endorsed:] Filed Aug. 7, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

32 In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Order Allowing Appeal.

On reading and filing the petition of plaintiff herein for an order allowing an appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the final decree herein, and the filing herein of the assignment of errors relied upon, and an undertaking on appeal duly approved by the Court,—

It is ordered that an appeal in the United States Circuit Court of Appeals of the Ninth Circuit from the final decree hereinabove referred to be, and the same is hereby allowed, and that a transcript

of the record be forthwith transmitted to the United States Circuit Court of Appeals of the Ninth Circuit.

Done in open court this 7th day of August, 1920.

WM. H. SAWTELLE,
District Judge.

33 Received copy this 7th day of August, 1920.

FRANK M. SILVA,
U. S. Atty.
E. M. LEONARD,
Asst. U. S. Atty.

[Endorsed:] Filed Aug. 7, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Bond on Appeal.

Know all men by these presents: That we, Regal Drug Corporation, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto Justus S. Wardell, United States Collector of Internal Revenue of the First District of California, defendant, in the sum of Three Hundred (300) Dollars, to be paid to said defendant, his heirs, execu-
34 tors, administrators or assigns, to which payment well and truly to be made we bind ourselves, successors and representatives jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of August, 1920.

Whereas, the plaintiff above named has been granted an appeal by the above-entitled court, from a final decree entered by said court in a suit therein pending and entitled as above:

Now, therefore, the condition of the above obligation is such that if the said plaintiff shall prosecute the said appeal to effect, and if it fail to make its appeal good, shall answer [33] all costs which may be awarded against it, the obligation to be void; otherwise it shall remain in full force and effect.

REGAL DRUG CORPORATION,
By C. S. NOBLE, *President.*
[Corporate Seal.] NATIONAL SURETY COMPANY,
By F. J CRISP,
Its Attorney in Fact. [34]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 11th day of August, in the year one thousand nine hundred and nineteen, before me, Julius Calmann, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared F. J. Crisp known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National
35 Surety Company, the corporation in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said F. J. Crisp acknowledged to me that he subscribed the name of the National Surety Company thereto as principal, and his own name as attorney in fact.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[SEAL.] JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is hereby approved the 9th day of August, 1920.

FRANK H. RUDKIN,
District Judge.

The premium on this bond is $10 per annum.

[Endorsed:] Filed Aug. 11, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

36 In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,
vs.
JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Præcipe for Transcript of Record.

To the Clerk of the United States District Court for the Northern District of California:

You will please certify and transmit to the United States Circuit Court of Appeals of the Ninth Circuit the record on appeal in the

above-entitled cause, including the following papers therein: Bill of complaint; amended bill of complaint; motion to dismiss; order granting motion to dismiss; opinion on motion to dismiss; decree; petition for appeal; assignment of errors; bond on appeal; order allowing appeal; citation on appeal; and this precipe.

Dated the 7th day of August, 1920.

JOHN W. PRESTON,
ROBERT DUNCAN,
Solicitors for Plaintiff.

37 Receipt of a copy of the within Aug. 7, 1920.

FRANK M. SILVA,
U. S. Atty.
E. M. LEONARD,
Asst. U. S. Atty.

[Endorsed:] Filed Aug. 7, 1920. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk. [36]

(Title of Court and Cause.)

(*Precipe for Additional Transcript of Record.*)

To the clerk of said court:

Sir:

Please certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit in addition to papers requested by precipe presented by solicitors for plaintiff the following: Affidavits of Edward Thomas O'Day, W. G. Walker, and Edward A. Kenny.

Dated August 10th, 1920.

FRANK M. SILVA,
United States Attorney;
E. M. LEONARD,
Asst. United States Attorney,
Attorney for Defendant.

[Endorsed:] Filed Aug. 10, 1920. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk. [37]

38 In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Certificate of Clerk U. S. District Court to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-seven (37) pages, numbered from 1 to 37 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the præcipes for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $15.95; that said amount was paid by the attorneys for the plaintiff; and that the original citation issued herein is hereunto annexed.

39 In testimony whereof, I have hereunder set my hand and affixed the seal of said District Court this 24th day of August, A. D. 1920.

[SEAL.] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [38]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

In Equity.

No. 560.

REGAL DRUG CORPORATION, a Corporation, Plaintiff,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Justus S. Wardell, United States Collector of Internal Revenue of the First District of California, Defendant, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, State of California, on the 6th day of September, 1920, pursuant to an order allowing appeal, wherein Regal Drug Corporation, a corporation is appellant and you are appellee to show cause, if any there be, why the final decree in said order allowing appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. H. Sawtelle, United States District Judge of the Ninth Judicial Circuit, Northern District of California, Southern Division, this 7th day of August, 1920, and of the Independence of the United States the 148th.

WM. H. SAWTELLE,
United States District Judge. [39]

Receipt of a copy of the within admitted Aug. 7, 1920.

FRANK M. SILVA,
U. S. Atty.
E. W. LEONARD,
Asst. U. S. Atty.

[Endorsed:] In Equity—No. 560. In the Southern Division of the United States District Court, for the Northern District of California, Second Division. Regal Drug Corporation, a Corporation, Plaintiff, vs. Justus S. Wardell, United States Collector of Internal Revenue of the First District of Columbia, Defendant. Citation on Appeal. Filed Aug. 7, 1920. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

[Endorsed:] No. 3536. United States Circuit Court of Appeals for the Ninth Circuit. Regal Drug Corporation, a Corpora-
41 & 42 tion, Appellant, vs. Justus S. Wardell, as United States Collector of Internal Revenue of the First District of California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.
Filed August 24, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By PAUL P. O'BRIEN,
Deputy Clerk.

43 & 44 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

45 In the United States Circuit Court of Appeals for the Ninth Circuit.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

Order to Maintain the Status Quo.

Upon reading the verified petition of appellant praying for an order to maintain the status quo pending the determination of this appeal, and the United States District Attorney stating that he does not oppose the application for the following order:

It is ordered that the enforcement of the Warrants of Distraint dated July 19, 1920, and numbered 2157, 2158, 2159 and 2160, in the hands of appellee herein and directed against appellant herein,

and all further proceedings by virtue of said warrants, be, and the same hereby are, suspended and enjoined during the pendency of this appeal, and it is ordered that all matters thereunder remain in statu quo, upon the condition that within ten days from date hereof the appellant execute unto appellee and file in this cause a good and sufficient bond in the sum of Fifteen Hundred (1,500) Dollars, with sureties to be approved by the clerk of this court, and conditioned that appellant will promptly pay any and all damages
46 which may be suffered by appellee by reason of the granting or continuance of this order if it is adjudged ultimately that the warrants of distraint, drawn in question in this case, are valid ones.

Dated this 12th day of August, A. D. 1920.

WM. W. MORROW,
W. H. HUNT,
Judges.

E. M. LEONARD,
Asst. U. S. Atty.

[Endorsed:] Order to Maintain the Status Quo. Filed August 12, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. The form of the within order is approved and a bond in the sum of $1,500 is acceptable. Dated this 11th day of August, 1920.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the Twenty-sixth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; The Honorable William W. Morrow, Circuit Judge; The Honorable William H. Hunt, Circuit Judge.

47 No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

Order of Submission.

Ordered appeal in the above-entitled cause argued by Mr. Robert Duncan, counsel for the appellant, and by Mr. Edward M. Leonard, Assistant United States Attorney and counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for appellant to file a reply brief within ten (10) days from date.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Second Day of May, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; The Honorable Erskine M. Ross, Circuit Judge; The Honorable William H. Hunt, Circuit Judge.

48 In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, Ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * Regal Drug Corporation, a Corporation, Appellant, vs. Justus S. Wardell, United States Collector of Internal Revenue of the First District of California, Appellee. No. 3536.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

49 *Opinion U. S. Circuit Court of Appeals.*

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

John W. Preston, Robert Duncan, Solicitors for Appellant.
Frank M. Silva, U. S. Attorney, E. M. Leonard, Assistant U. S. Attorney, Solicitors for Appellee.

Before Gilbert, Morrow, and Hunt, Circuit Judges.

Morrow, *Circuit Judge:*

This is an appeal from the decree of the District Court dismissing a bill in equity filed by the Regal Drug Corporation of San Francisco, California, against Justus S. Wardell, Collector of Internal Revenue

of the First District of California, to enjoin the collection of certain taxes and penalties assessed against the plaintiff by the Commissioner of Internal Revenue under the provisions of Section 35 of Title II of the National Prohibition Act (41 Stat. 305-317). The bill was dismissed by the District Court pursuant to the prohibition contained in section 3224 of the Revised Statutes, providing that: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

It is alleged in plaintiff's amended complaint that the appellant is a California Corporation having a large drug store at 119
50 Market Street, San Francisco, and has been engaged in the business of selling drugs at said location and maintaining on said premises a large stock of drugs, medicines and sundries, other than intoxicating liquors; that said stock was worth about the sum of fifteen thousand ($15,000) dollars; that on the 28th of October, 1919, plaintiff was the holder of a permit authorizing the plaintiff to sell intoxicating liquors and distilled spirits for non-beverage purposes; that said permit was issued to the plaintiff by the proper officials of the Government in accordance with the provisions of the National Prohibition Act; that plaintiff continued to be the holder of said permit until some time in the month of June, 1920, and during that time said permit was in full force and effect; that during the time plaintiff was the holder of such permit he purchased and withdrew from bonded warehouses under the supervision of officials of the United States Government, distilled spirits to the amount of about seventeen thousand nine hundred (17,900) gallons; that during such time he also purchased and withdrew from such bonded warehouses sweet wines containing not over twenty-one per cent of alcohol, amounting to about four hundred and fifty (450) gallons, and during such time plaintiff purchased dry wines containing not over fourteen per cent of alcohol, amounting to about twenty (20) gallons; that all taxes and assessments against said distilled spirits, intoxicating liquors, sweet and dry wines, which were levied and could be levied thereon by the United States Government in every form, were fully paid by the
51 plaintiff in advance; that during said time and when said permit was in full force and effect said plaintiff disposed of all of said distilled spirits, intoxicating liquors, sweet and dry wines and the same were sold and disposed of by said plaintiff under said permit and under and in accordance with the provisions of the National Prohibition Act; that plaintiff, upon receiving said permit, caused to be filed with the proper United States authorities in accordance with law a bond in the sum of one hundred thousand ($100,000) dollars in the form required by said law, respecting the sale or use of distilled spirits, intoxicating liquors and wines for other than beverage purposes, and the said bond is still in full force and effect and the surety on said bond is fully able to respond to the full amount thereof; that on or about the month of June, 1920, the Commissioner of Internal Revenue arbitrarily levied against said plaintiff a so-called assessment or tax at the rate of six and forty one-hundredths ($6.40) dollars per gallon, amounting to one hun-

dred and fifteen thousand and ninety-two and fifty one-hundredths ($115,092.50) dollars upon the distilled spirits which had been withdrawn by said plaintiff from said bonded warehouses between the 20th of October, 1919, and the time when the permit of said plaintiff to sell and dispose of said distilled spirits was revoked in June, 1920; that said commissioner also arbitrarily levied a so-called tax or assessment against the plaintiff at the rate of forty (40¢) cents per gallon on all sweet wines purchased and disposed of by plaintiff during such time, amounting to one hundred and fifty-three and eighty one-hundredths ($153.80) dollars; that said commissioner also levied against the plaintiff a so-called tax or assessment on all dry wines purchased and disposed of by plaintiff at the rate of sixteen (16¢) cents per gallon, amounting to the sum of three and twenty one-hundredths ($3.20) dollars; that none of said levies were either taxes or assessments, but were in fact fines and penalties attempted to be imposed on plaintiff; that the plaintiff had already paid taxes, on all of said articles amounting to the sum of thirty-nine thousand six hundred and fifty-six and eighty-nine one-hundredths ($39,656.89) dollars; that the Commissioner of Internal Revenue claimed and claims that there was due from plaintiff a further sum of seventy-five thousand five hundred ninety-two and sixty-one one-hundredths ($75,592.61) dollars as a so-called tax or assessment on such distilled spirits, intoxicating liquors and wines over and above the amount already paid by the plaintiff; that said Commissioner of Internal Revenue also levied against plaintiff a penalty in the sum of five hundred ($500) dollars for retailing and selling distilled spirits, intoxicating liquors and wines in violation of the law, and also levied against plaintiff a penalty in the sum of ninety-three and seventy-five one-hundredths ($93.75) dollars for having conducted the business of a rectifier and also levied against plaintiff a penalty in the sum of one thousand ($1,000) dollars for having manufactured distilled spirits or intoxicating liquor in violation of law; that all taxes and assessments which could be properly levied upon all of said distilled spirits, intoxicating liquors and wines had been and were fully paid at the time the same were purchased and withdrawn by plaintiff from bonded warehouses. That prior to the levy of said so-called taxes, assessments and penalties all of the said distilled spirits, intoxicating liquors and wines had been sold and disposed of by plaintiff; that the said Commissioner of Internal Revenue did not, nor did his assistants, deputies, or agents hold or conduct any hearing in regard to the matter, or give any notice thereof to plaintiff or to its officers or agents in regard thereto, or that the same was proposed to be levied or assessed against the plaintiff; that on the 15th day of July, 1920, the Collector of Internal Revenue took possession of plaintiff's drug-store and of the entire stock of drugs and goods therein and was proceeding to and threatening to sell the same to satisfy the claim for the so-called taxes, assessments and penalties; that plaintiff has established a good business and trade at the said store, and unless the Collector of Internal Revenue is restrained and enjoined from remaining in possession of said stock

the business of plaintiff will be entirely ruined and the goodwill of said business entirely destroyed, and that the damage done to plaintiff thereby will be irreparable.

The defendant interposed a motion to dismiss the complaint on the ground that it did not state facts sufficient to entitle
54 plaintiff to any relief and that plaintiff had a plain, speedy and adequate remedy at law.

The Court granted the motion on the ground that Section 3224 of the Revised Statutes provided that: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and the Government had provided a complete system of corrective justice in regard to all taxes imposed by the Government founded upon the idea of appeals within the executive departments.

Section 600 (*a*) of the Act to "Provide Revenue and for Other Purposes," approved January 24, 1919 (40 Stat. 1057-1105), provides:

"That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the Internal Revenue Taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage a tax of $6.40) on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn and collected under the provisions of existing law."

55 Section 611 of the Act provides:

"That upon all still wines * * * which on the day after the passage of this act (February 25, 1919) are on any winery premises or other bonded premises or in transit thereto or at any custom house, there shall be levied, collected and paid in lieu of the internal revenue tax now imposed thereon by law, taxes at rates as follows, when sold, or removed for consumption or sale: * * * On wines containing not more than 14 per centum of absolute alcohol, 16 cents per wine gallon, the per centum of alcohol taxable under this section to be reckoned by volume and not by weight; on wines containing more than 14 per centum and not exceeding 21 per centum of absolute alcohol, 40 cents per wine gallon."

Section 35 of the act provides:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed

upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty
56 of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

The National Prohibition Act took effect and was in force from and after the date when the eighteenth amendment to the Constitution took effect (41 Stat. 307–322). The amendment was ratified January 28, 1919, and took effect January 29, 1920. It provided that:

"After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

Section 3 of the National Prohibition Act (41 Stat. 307–308) provides:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this act and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

57 This act was in full force and effect when the Commissioner of Internal Revenue levied the tax, the collection of which the plaintiff seeks to enjoin by this action.

The appellant states the question in controversy as follows:

"Where a person has legally withdrawn intoxicating liquor from a bonded warehouse for nonbeverage purposes, and at the time of withdrawal has paid all taxes thereon, and has then sold such liquor, has the Commissioner or Collector of Internal Revenue any power or warrant, under Section 35, Title II of the National Prohibition Act, after said liquor has been sold and said Commissioner and Collector of Internal Revenue surmises that some of said liquor has been sold for beverage purposes in violation of law, to levy, assess, or collect from such person a further sum under the guise of a tax, as though the liquor had been withdrawn in the first instance for beverage purposes?

"Another question to be determined is—Can such Commissioner or Collector proceed to levy and collect from such person a five hundred dollar penalty for selling liquor in violation of law, and a further penalty in the sum of one thousand ($1,000) dollars for manufacturing in violation of law, and a further penalty in the sum of ninety-three and 75/100 ($93.75) dollars for rectifying in violation of law, and can they do all these things without any hearing granted to that person?"

58 The appellant adds:

"All of the facts involved here took place after the National Prohibition Act was enacted, which was on October 28, 1919. At that time and since, complete prohibition of the sale of intoxicating liquor for beverage purposes has been in effect."

The appellant contends that as the 18th amendment and the statute passed for its enforcement prohibits absolutely the manufacture and sale of intoxicating liquors and wines for beverage purposes, the provisions of the prior law inconsistent with the constitutional enactment and the enforcing statute have been repealed and there can be no tax assessed or imposed on such liquors and wines. In other words, there can be no legal tax, so it is contended, upon that which cannot be legally manufactured or sold and that if manufactured or sold illegally, the liability of the offender is for a penalty and not for a tax and if it is for a penalty its collection must be enforced by proceedings in court and not by the summary proceedings of an assessment. Conceding that the tax is in the nature of a penalty, it does not follow that its collection can be restrained by a suit in equity if there is a speedy and adequate remedy at law. That there is such a remedy at law cannot be seriously controverted.

Section 3220 of the Revised Statutes provides:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

59

Section 3228 provides:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury, established in pursuance thereof, and a decision of

the Commissioner has been had therein: provided that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought without first having a decision of the commissioner at any time within the period limited in the next section."

It does not appear from the amended bill of complaint, nor is it otherwise claimed that the plaintiff has appealed to the Commissioner of Internal Revenue for the abatement of the tax assessed against him in this case.

That this suit cannot be maintained has been conclusively determined by the Supreme Court of the United States in Cheatham vs. United States, 92 U. S. 85–88; State Railroad Tax Cases, 92 U. S. 576–613; and Dodge vs. Osborn, 240 U. S. 118.

In the latter case, the Supreme Court, quoting from Snyder vs. Marks, 109 U. S. 189, 193, 194, says:

"The inhibition of Rev. Stat., sec. 3224, applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * Cheatham vs. United States, 92 U. S. 85, 88, and again in State Railroad Tax Cases, 92 U. S. 575, 613, it was said by this Court that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by section 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assignment (assessment) and claim that it is valid."

The judgment of the District Court is affirmed.

[Endorsed:] Opinion. Filed May 2, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, as United States Collector of Internal Revenue of the First District of California, Appellee.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

Decree U. S. Circuit Court of Appeals.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division, and was duly submitted.

62 On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed:] Decree. Filed and entered May 2, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court Room Thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Seventeenth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; The Honorable Erskine M. Ross, Circuit Judge; The Honorable William H. Hunt, Circuit Judge.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

Order Staying Issuance of Mandate.

63 Upon oral motion of Mr. John W. Preston, counsel for the appellant, and good cause therefor appearing, ordered mandate of this Court under Rule 32 in the above-entitled cause stayed to and including July 5, 1921.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

Præcipe for Transcript of Record.

To the clerk of the said court.

SIR:

Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals), and not less than nine uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under Section 240 of the Judicial Code, in the above-entitled cause, the said transcript to consist of a copy of the following:

1. Printed Transcript of Record, on which the cause was heard in said Circuit Court of Appeals, to which will be added a
64 printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Order filed August 12, 1920, suspending proceedings, etc.

3. Order of Submission, entered October 26, 1920;

4. Order Directing Filing of Opinion, etc., entered May 2, 1921;

5. Opinion, filed and entered May 2, 1921;

6. Decree, filed and entered May 2, 1921;

7. Order Staying Issuance of Mandate entered May 17, 1921;

8. Præcipe for Transcript of Record, filed May 20, 1921;

9. Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript.

J. W. PRESTON,
ROBERT DUNCAN,
Counsel for the Appellant.

Service of a copy of the within præcipe is hereby admitted this 20th day of May, A. D. 1921.

FRANK M. SILVA,
M. L.,
Counsel for the Appellee.

[Endorsed:] Precipe for Transcript of Record. Filed May 20, 1921. F. D. Monckton, Clerk.

65 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue of the First District of California, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-four (64) pages, numbered from and including 1 to and including 64, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to precipe of counsel for the appellant, filed May 20, 1921, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

66 Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of May, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,

By PAUL P. O'BRIEN,
Deputy Clerk.

67 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Regal Drug Corporation is appellant, and Justus S. Wardell, United States Collector of Internal Revenue of the First District of California, is appellee, No. 3536, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Dis-

trict Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
68 Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28341. Supreme Court of the United States, No. 386, October Term, 1921. Regal Drug Corporation vs. James S. Wardell, as United States Collector, etc. Writ of Certiorari. No. 3536. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 15, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

69 In the Supreme Court of the United States, October Term, 1921.

No. 386.

REGAL DRUG CORPORATION, Petitioner,

v.

JUSTUS S. WARDELL, as United States Collector of Internal Revenue for the First District of California, Respondent.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to the writ of certiorari granted therein.

JOHN W. PRESTON,
Counsel for Petitioner.
JAMES M. BECK,
Solicitor General.

November, 1921.

[Endorsed:] Stipulation as to return to writ of certiorari. Filed November 15, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

70 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, as United States Collector of Internal Revenue for the First District of California, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 15th day of November, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of November, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk.

By PAUL P. O'BRIEN,
Deputy Clerk.

71 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3536.

REGAL DRUG CORPORATION, a Corporation, Appellant,

vs.

JUSTUS S. WARDELL, as United States Collector of Internal Revenue for the First District of California, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, com-

manding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari" the original of which stipulation was filed in my office on the 15th day of November, A. D. 1921.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of November, A. D. 1921.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By PAUL P. O'BRIEN,
Deputy Clerk.

72 [Endorsed:] File No. 28,341. Supreme Court U. S. October Term, 1921. Term No. 386. Regal Drug Corporation, Petitioner, vs. James S. Wardell, U. S. Collector, &c. Writ of certiorari and return. Filed Nov. 23, 1921.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1922

No. 108

REGAL DRUG CORPORATION
(a corporation),
Plaintiff in Error,

vs.

JUSTUS S. WARDELL, as United States Collector of Internal Revenue for the First District of California,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

A complete statement of the case will be found in the brief filed herein in support of the petition for writ of certiorari. The same is set forth at pages 13 to 17, inclusive, of that record.

Errors Relied Upon.

Specifications of error will also be found in that brief on pages 18 and 19, which are hereby respectfully referred to. The lower court held that this suit could not be maintained because of the provisions of Section 3224 of the Revised Statutes of the United States. This is the error we rely upon here.

Argument.

A very full brief was filed herein in support of the petition for writ of certiorari and contained all of the points we wish to present on behalf of the plaintiff in error. No good would be accomplished by the repetition here of what is there said. Certain cases have been decided, however, since that brief was filed, which we desire to call to this honorable court's attention.

We feel that the points involved in the present case have been decided by this honorable court in the case of *Lipke v. Lederer*, reported in the Advance Opinions, No. 17, at page 612, issued July 15, 1922, the decision itself having been rendered on June 5, 1922.

In the present case an enormous so-called tax was levied against plaintiff in error by the Collector of Internal Revenue, under Section 35 of the National Prohibition Act. No hearing was accorded plaintiff in error. Demand was made for said tax and then a warrant of distraint was issued under

which the property of this plaintiff was seized to satisfy said so-called tax. This proceeding was brought to restrain the collection of said alleged tax by warrant of distraint. Our claim is that this is not a tax, but a penalty inflicted as a punishment for crime. If the word "tax" were not used in said Section 35, no one would ever think of designating this as a tax. This honorable court said in the case of *Lipke v. Lederer, supra:*

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. Bailey v. Drexel Furniture Co. (May 15, 1922) (—— U. S.——, ante, 522, 42 Sup. Ct. Rep.——). When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613, 47 L. ed. 614, 617, 23 Sup. Ct. Rep. 427. Evidence of crime (Sec. 29) is essential to assessment under Sec. 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government', and clearly involves the idea of punishment for infraction of the law,—the definite function of a penalty."

It was held that Section 3224 of the Revised Statutes had no application. We can see not the slightest distinction between that case and the present case. The allegations in the petition in the present case even bring it clearly within the requirements of the dissenting opinion filed in the case of *Lipke v. Lederer.*

It is alleged in our petition and admitted by the demurrer that the plaintiff in error was unable to

pay the enormous amount levied against it and was unable to secure the necessary funds or any substantial portion thereof; furthermore that other very grave losses will be sustained by the plaintiff in error, by proceeding to sell its property, which cannot be redressed.

The identical question presented here was ruled upon by the Circuit Court of Appeals, Fifth Circuit, in *Fontenot v. Accardo,* 278 Fed. 871. An opinion in the United States District Court in that case had been rendered prior to the filing of our brief in support of the petition for writ of certiorari and is cited on page 63 of our brief. Since the filing of that brief, the opinion of the Circuit Court of Appeals has been handed down, affirming the decision of the lower court, and holding that the so-called taxes or penalties set forth in Section 35 of the National Prohibition Act are merely additional penalties for the violation of a criminal statute, and that a suit to enjoin collection of such penalties does not fall within the provisions of Section 3224 of the Revised Statutes of the United States.

In the case of *U. S. v. 2000 Cases of Whiskey, etc.,* 277 Fed. 410, it was held by the Circuit Court of Appeals of the Second Circuit that Section 35 of the National Prohibition Act providing that regulations therein for the manufacture or traffic in intoxicating liquors shall be construed as in addition to existing laws, and it shall not relieve any one from paying any taxes or charges imposed on the manufacture

or traffic in *such liquor*, refers to intoxicating liquor for *non-beverage purposes* and that the act is not intended as a taxing measure in respect to intoxicating liquor for *beverage* purposes.

It may be argued here that the tax in the present case was not levied under Section 35 of the National Prohibition Act but was levied under the Revenue Act of 1918. If such an argument should be presented our answer is that the Revenue Act, so far as it applies to distilled spirits for beverage purposes, has been repealed by the National Prohibition Act. Liquors can no longer be withdrawn from bond for beverage purposes. If they are withdrawn for such purposes a crime is committed then and there.

Gray v. United States, 276 Fed. 395;
U. S. v. Yuginovich, 256 U. S. 450; 65 L. Ed. 1043.

We think the plaintiff in error is entitled to have the judgment of the lower court reversed with directions to restrain any further action looking toward the collection of said so-called tax.

Dated, San Francisco,
October 11, 1922.

Respectfully submitted,

JOHN W. PRESTON,
Attorney for Plaintiff in Error.